

Forest Legacy Program National Meeting

Salt Lake City, UT

May 13, 2014

WATER RIGHTS AND USES



Silver Creek, Boise NF

Overview

Water Rights 101 - Brief Overview

- I. Obtain Water Rights
- II. Maintain Water Rights
- III. Protect Water Rights
- IV. Third Party Water Use

Conclusion

Q & A



Water Rights 101



WATER MATTERS

Land purchases and easements offer an opportunity to consider water use alternatives or efficiencies that benefit conservation objectives.

Complying with State water law is critical
and **EVERY STATE IS DIFFERENT!**

The bottom right portion of the slide features a decorative graphic of several concentric, light blue circles that resemble ripples on water, set against the dark blue background.

WHY DO WATER RIGHTS MATTER?

- Resource objectives and multiple use activities require water.
- In many states water rights are required under State law.
- Water is an interest in land. It is one of the sticks in the bundle.



Silver Creek, Boise National Forest

WHY DO WATER RIGHTS MATTER?

Because you can't assume that water will always be available.



Stanislaus NF

Fundamentals of Water Rights

- Water rights are the right to use water.
- Water rights are real property which need to be managed accordingly, i.e., valued, inventoried and maintained.
- Water rights do not grant a right of access to the land but they may be an encumbrance.

Definition of a Water Right

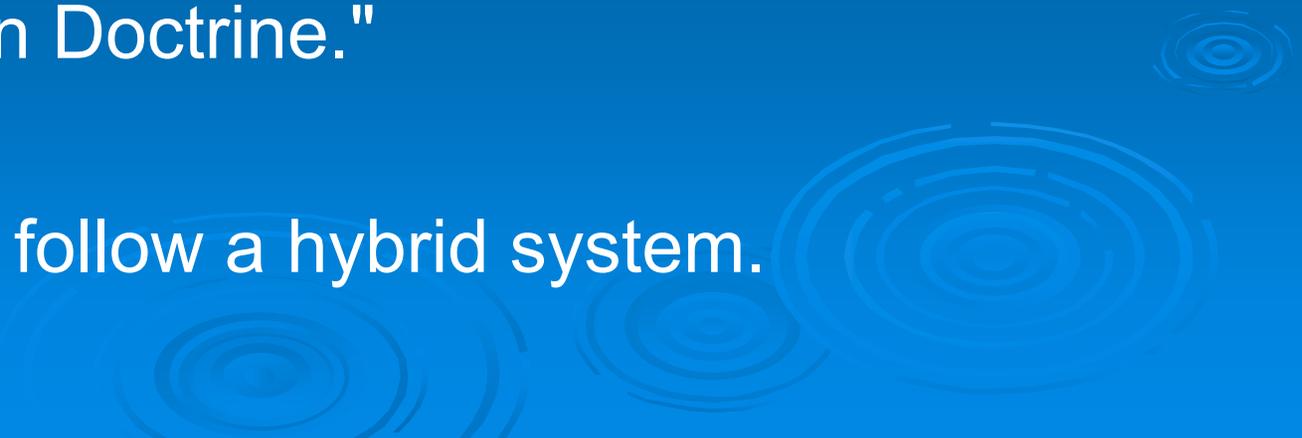
Elements of a water right include the right to use water:

- of a specific quantity (rate and amount),
- diverted from an identified source (surface or groundwater),
- at a specific location,
- in priority,
- for a beneficial use,
- during an identified period of time,
- without waste.



State Water Allocation

"Riparian" vs "Prior Appropriation"

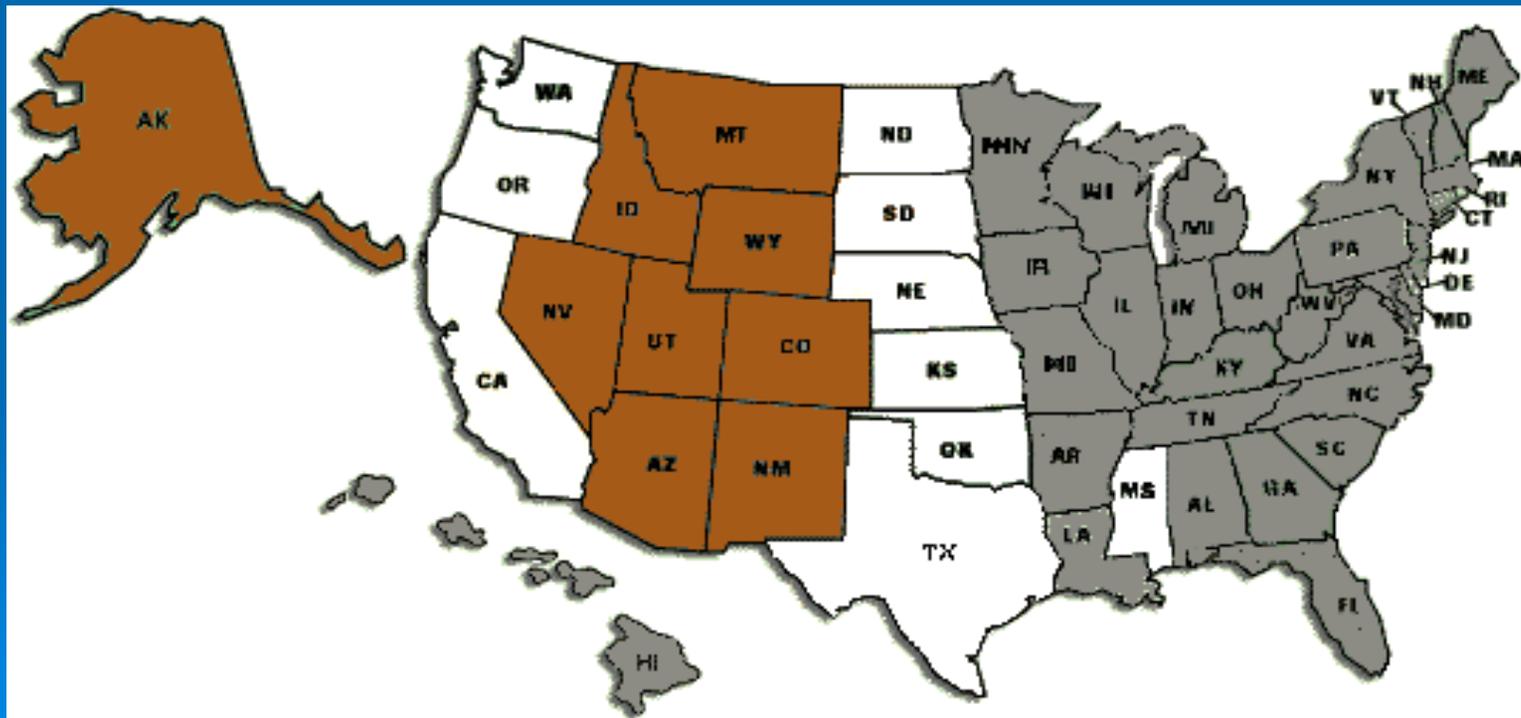
- Most states in the Eastern United States, where there is an abundant supply of water, follow the "Riparian Doctrine."
 - Most states in the Western United States, where water is extremely limited, follow the "Prior Appropriation Doctrine."
 - A few states follow a hybrid system.
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State Water Allocation "Riparian" vs "Prior Appropriation"

Brown = Prior Appropriation

Grey = Riparian

White = Hybrid



The Prior Appropriation Doctrine



The Prior Appropriation Doctrine

- Water rights are unconnected to land ownership and can be sold or mortgaged like other real property.
- "First in time is first in right" meaning that the earliest appropriator has the first right to use the water.
 - EARLIER PRIORITY DATES OFTEN HAVE MORE VALUE!
- Application of the water to a beneficial use is the basis and measure of the right.
- Water must be used. Non-use can lead to forfeiture or abandonment and loss of the water right.

Obtain Water Rights



Pots-Um-Pah Spring
Cedar City, Utah

Obtain Water Rights

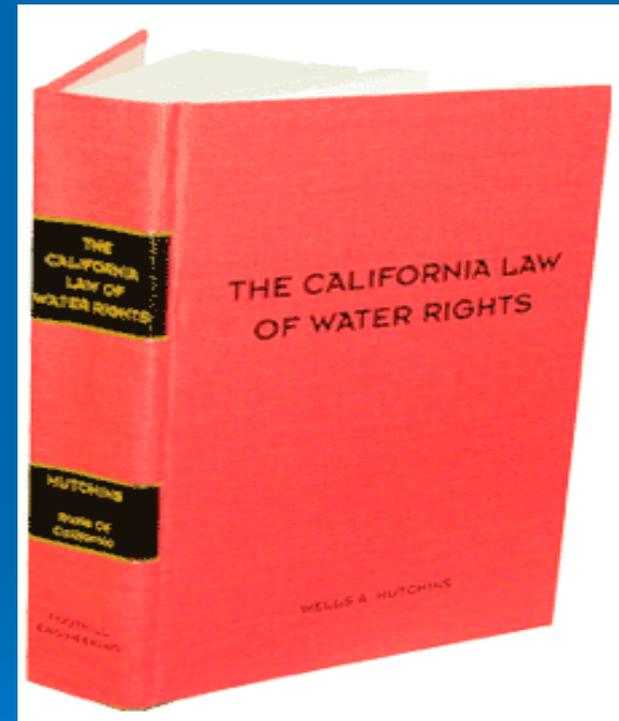
Ensure that all necessary water rights from surface and groundwater sources are legally secured in a timely manner...before the use occurs.



Obtain Water Rights

Obtain water rights under State law for uses occurring on land acquired through purchase.

Every State has it's own statutory provisions for water rights and uses.



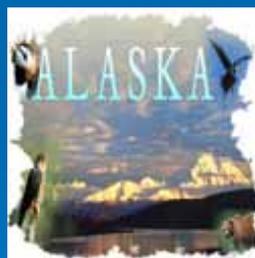
Water Rights = State Law

The state determines:

- How the water right is obtained
- What uses of water are “beneficial”
- How water right is managed once it is obtained
- How ground and surface water interact



Water rights are defined by State law.



The Forest Service recognizes State authority to administer water allocation.



Obtain Water Rights – Instream Flows

- Most western states only allow State Agencies to hold non-consumptive instream flow (ISF) water rights.
- The Federal Government and private parties may not be able to hold an ISF right under State Law.



Cebolla Creek, Gunnison NF, Colorado

How Are Water Rights Obtained?

- Administrative Process - Application

- Apply
- Public Notice
- Protest
- Hearing
- Permit
- Certificate/License



- Legal Process - Adjudication = Decree

- McCarran Amendment – Joins the United States to state water right adjudications.

- Purchase/Exchange and Change of Ownership

Purchases and Exchanges

If water rights can't be obtained through application processes, then acquire existing water rights via purchase or exchange, but only acquire rights that the Agency can legally put to a beneficial use.



Water Rights – Due Diligence

- Start early to investigate water right issues.
- Verify validity of water rights before making appraisal requests.
- Assign water rights specialist to review proposals.
- Acquire only water rights that the Agency can use and manage.
- Clearly identify and condition any water right that will be retained or managed outside of State ownership.
- Work with third parties, such as water trusts, to address flow management issues.
- Consider alternatives to achieve benefits without necessarily buying the water rights.

Land Purchase Actions

- Analysis of existing water rights and field verification of recorded rights.
 - Will the water rights meet the intended need?
- Are water rights appurtenant to the land?
- Do not assume that a transfer of land will include a transfer of water rights.
- Expressly identify water rights in any deed or easement.

Land Purchase Actions

If water rights are obtained that need to be changed to meet conservation objectives, be sure to work closely with the State Water Resources Agency to ensure compliance with State law.

APPLICATION FOR PERMANENT CHANGE
OF WATER
STATE OF UTAH

Fee: \$100.00
Per Acre \$100.00

For the purpose of allowing permission to make a permanent change of water in the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements of Section 73-9-3 Utah Code, Annotated 1953, as amended.

CHANGE APPLICATION NUMBER: WATER RIGHT NUMBER: 61-1271
11394600001

This Change application proposes to change the RIGHTS OF DIVERSION and PLACE OF USE.

1. OWNERSHIP INFORMATION:

A. NAME: USA Forest Service
ADDRESS: 324 25th Street
Ogden UT 84401
INTEREST: 100%

FILING DATE:

EVERY STATE IS DIFFERENT!

Maintain Water Rights

Maintain diversions, impoundments, or other facilities required to exercise the associated water rights.



Maintain Water Rights

- Apply the water to the purposes, and in the manner specified in the water right permit, license, decree or other recognized documentation.
- Comply with State regulations for changes to existing water rights.
 - Recognize that most State laws do not allow a change of existing consumptive use water rights to a non-consumptive instream flow use.



Maintain Water Rights

- Maintain a current inventory of all existing water rights and uses and water infrastructure.
- Manage those interests strategically to promote efficient use and conservation of water used for Agency purposes.

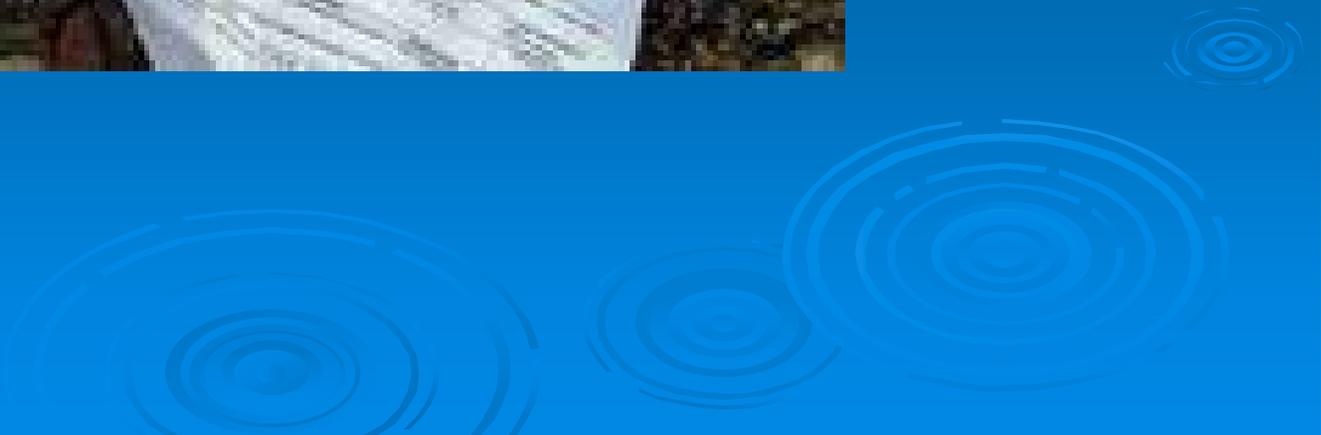


Maintain Water Rights

Improving efficiencies in diversions, and installing fish screens and measuring devices, can help to improve streamflow without affecting the ability to continue irrigation.



Protect Water Rights



Protect Water Rights

Manage water rights as real property and ensure that water rights are used for their intended purpose as stated in the water right and are not lost through non-use or abandonment.

Protect water quantity and quality by exercising water rights appropriately.



Protect Water Rights

Comply with State laws regarding administration and maintenance of water rights, including:

- Reporting
- Payment of Fees or Assessments
- Notification to State Agencies when there is a need for a delivery call or enforcement of an Agency water right.



Protect Water Rights

Ensure that water rights acquired will serve the present and future foreseeable needs of the Agency and that State law and regulations allow for the contemplated use.



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Case Study

BUSTERBACK RANCH



The Busterback Purchase

- In 1992 the FS purchased the Busterback Ranch and 5 irrigation water rights in the Upper Salmon River Basin for the purpose of enhancing flows for salmon migration.
- The cost of this acquisition was 3.2 million dollars. The Bonneville Power Administration (BPA) contributed \$769,000 toward the purchase in order to dedicate the water rights to instream flow.
- Unfortunately, Idaho State law provides no mechanism for the FS to convert these irrigation water rights to instream flow water rights. The water rights have not been used for irrigation since they were purchased and have been at risk of forfeiture.

Salmon River - Idaho Before



Salmon River - Idaho After



Protecting the Investment

- The Endangered Species Act ("ESA") prohibits federal action that may jeopardize the existence of any threatened or endangered species. 16 U.S.C.1531 et seq.
- Irrigation diversions by the Forest Service would constitute federal action. Had the Forest Service undertaken historic irrigation withdrawals during the 1992 through 2010 irrigation seasons this action would have resulted in a “likely to adversely affect” determination.
- The Forest Service continues to assert a "defense to forfeiture" based on these ESA concerns.

State Law Remedy

- The State of Idaho has not pursued forfeiture but asked the FS to work with them to protect these rights under State law.
- Effective January 1, 2009, the water rights were leased to the Idaho Water Supply Bank for instream flow purposes.
- A petition for a State held minimum streamflow (MSF) will be pursued.
- The FS water rights will be "rented" to meet the flow requirements of the MSF.
- The FS will retain "ownership" of the underlying irrigation rights.

The Rest of the Story

- In a similar situation in Nevada the FS paid \$2.1 million for water rights in a land exchange (Galena) without first determining if they could put those rights to beneficial use.
- An OIG Audit found that water rights acquired were not protected from potential loss.
- Those rights eventually were turned over to GSA and sold.

Moral of the Story

Ensure that water rights purchased or acquired can be put to beneficial use legally under State Law.



Stanley Basin, Sawtooth National Forest

Third Party Water Uses



Third Party Water Use

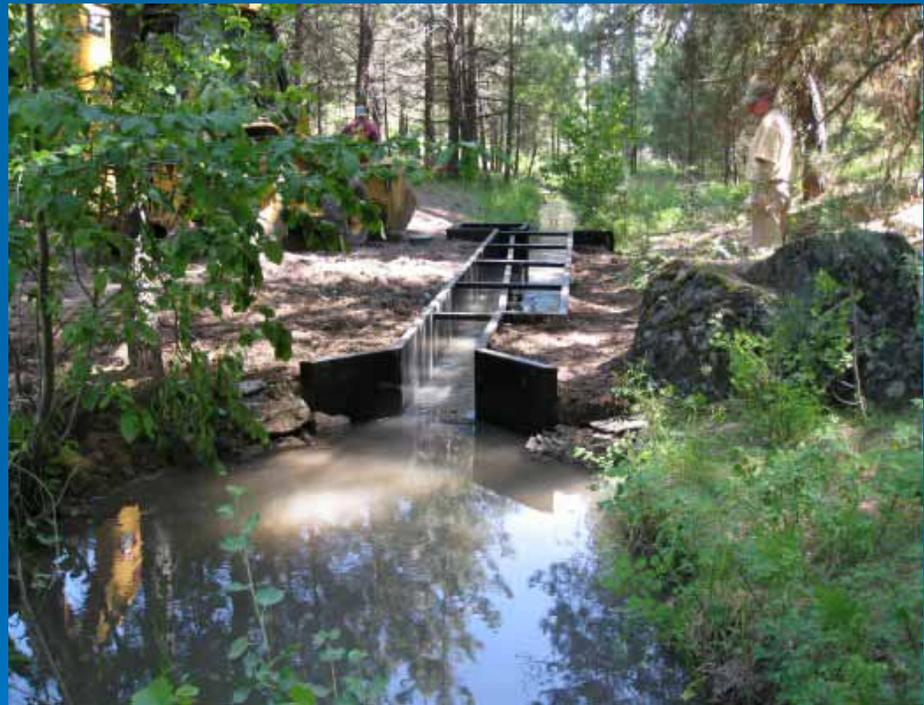
Ensure that third party water use on acquired property is in accordance with Agency land use authorization policies and regulations.

Gallatin NF
Rec. Res.



Third Party Water Uses What are They?

- ditches, canals, pipelines
- pump stations, diversion dams
- dams and other storage facilities
- wells and comprehensive groundwater development projects



Malheur National Forest

Third Party Water Use



Molas Ditch, San Juan NF, Colorado

- A water right does not create a right of access or development.
- The use must be within the limitations of the water right – location, amount, priority, purpose of use.

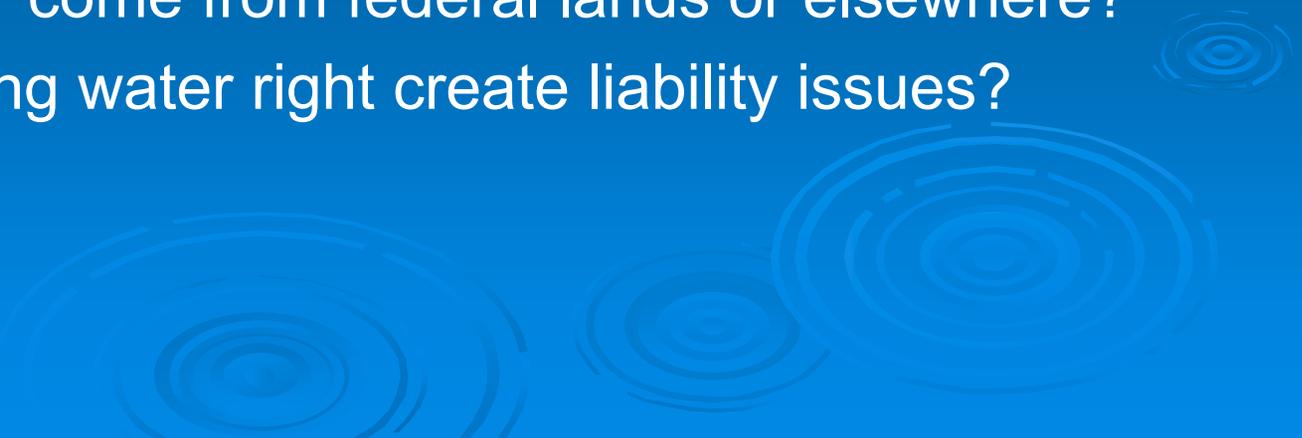
EMERGING ISSUES

Energy Development

Water Transactions/Partnerships

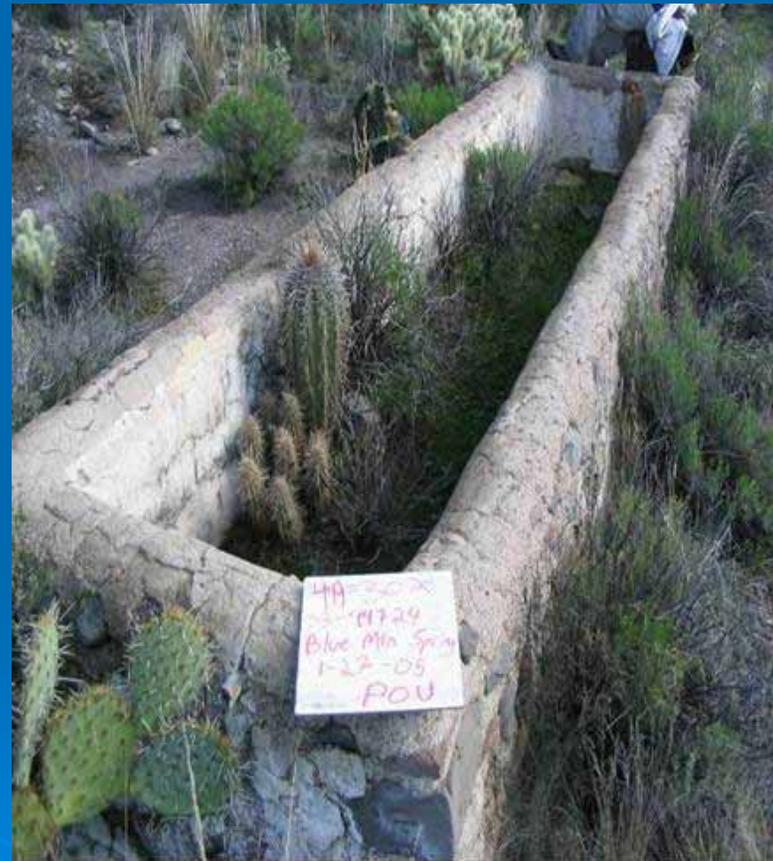
Groundwater Development

Consider the following:

- Who should hold the water rights?
 - Does water come from federal lands or elsewhere?
 - Does holding water right create liability issues?
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Conclusion

Water rights are
valuable
property
interests.



- "When the well is dry, we learn the worth of water."
- Benjamin Franklin

Q & A



Grey's River – Bridger-Teton NF,
Photo by Vic Bradfield